# Global Employer Handbook Chapter
# Prince Edward Island

## INTRODUCTION

Canada has 10 provinces and three territories. Prince Edward Island (known as PEI) is one of the four Atlantic provinces (PEI, Nova Scotia, New Brunswick, and Newfoundland and Labrador). PEI is also part of an area known as the Maritimes (which comprises Nova Scotia, PEI, and New Brunswick) PEI is the smallest province in Canada and is an island situated in the Northumberland Straight in the Gulf of Saint Lawrence.

PEI comprises approximately 5,656 square kilometers of which approximately 2,405 kms are farmland. The Island is connected to the Mainland (New Brunswick) by the Confederation Bridge, which is approximately 12.9 kilometers long, and opened in the Spring of 1997. It ends at Cape Jourimain, New Brunswick. Prince Edward Island can also be reached in the summer by ferry from Caribou, Nova Scotia.

The Province has four federal parliamentary seats and is represented in the Senate by four senators. There are 27 seats in the provincial government which is called the Legislative Assembly of Prince Edward Island. There are also municipal governments and town councils which govern local life in PEI's cities and rural areas.

There are approximately 157,000 inhabitants in PEI. The province has three counties: Prince, Queens and Kings. The provincial capital is Charlottetown, which is found in the county of Queens. Queens County has the most residents with a population of approximately 89,000, with approximately 36,000 living in the capital city of Charlottetown. Prince County has the next largest population, with approximately 45,500 inhabitants, over 14,000 of them living in the city of Summerside.

English is the predominant language spoken in Prince Edward Island. There is a small French population, mostly descended from the Acadians. There are two First Nations in PEI from the Mi'kmaq nation. PEI has one university, as well as several colleges and community college campuses.

PEI is known for its red beaches, potatoes, golf courses, and the fictional character Anne of Green Gables. Summer Tourism remains a significant industry.

Some of PEI's largest industries are:

- Aerospace
- Agriculture
- Fisheries

- Information & Communications Technology
- Renewable Resources
- Tourism

Canada has a universal health-care system which is paid for through taxes. Canadian citizens and permanent residents may apply for public health insurance. Each province has its own health insurance plan. Most provinces have a waiting period before becoming eligible for government health insurance coverage. Each province will provide a health insurance card to eligible residents, and this card must be shown when accessing medical services. The federal government provides a temporary health insurance for certain refugees, protected persons, and refugee claimants until they are eligible for provincial health insurance.

## PRINCE EDWARD ISLAND LABOUR AND EMPLOYMENT LAW

Employment relationships in Prince Edward Island ("PEI") are governed by legislation and common law. If the workplace is unionized, the employment relationship is also governed by a collective agreement.

Generally, Canadian provinces have jurisdiction over labour and employment law. Therefore, most employment-related cases are heard before provincial courts, boards, or tribunals (e.g., the Supreme Court of Prince Edward Island, The Prince Edward Island Court of Appeal, and the Prince Edward Island Labour Relations Board). The federal government retains jurisdiction in circumstances including specific works and undertakings within exclusive federal jurisdiction (e.g. shipping, air transportation, and banking, among others). Employers operating within federal jurisdiction are subject to federal legislation and will have matters heard before the Federal Court of Canada or the Canada Industrial Relations Board.

## I. HIRING

### A. Basics of Entering an Employment Relationship

- *At Will Vs. Just Cause (US & other appropriate jurisdictions)*

Employment relationships in Canada are not "at will". The presumption is that an employer and an employee intend the employment contract to remain in force indefinitely until it is ended either with notice or without notice for just cause, except for fixed-term employment contracts.

The rules governing employment relationships arise from both the common law and from legislation (statutes and regulations). These sources of law guide how terms of the employment contracts and, in unionized workplaces, provisions of the collective agreements, can be negotiated, applied and interpreted. The application of these rules depends on a variety of factors. Parties to all employment relationships have an employment contract with one another whether written or not. Employment contracts can be oral or implied, and do not need to be in writing to exist. However, if there is a dispute, it

is nearly impossible to ascertain the terms of the contract unless they are reduced to writing, and so employers should not rely on oral contracts alone.

- *Common Law Claims*

The employment relationship is regulated by rules derived from case law, jurisprudence, and other precedents. That body of law is referred to as the "common law". The common law includes a range of rules and concepts that both predate the Canadian legal system, as well as more recent statements and iterations articulated or refined by the courts and administrative boards and tribunals.

The common law is constantly changing. As new cases and decisions are released, they become part of the common law. Those new cases and decisions can result in significant changes to existing legal rules, or they may serve to reaffirm existing rules. Trends in certain decisions, or decisions from higher courts such as the Supreme Court of Canada, play a significant role in articulating this body of law. It is important to note-up or research the law when applying common law rules. This ensures that the common law rules as applied are accurate and reflect current legal principles.

- *Statutory Claims*

Employment in PEI is regulated by the *Employment Standards Act, RSPEI 1988, c E-6.2* (the "*Employment Standards Act*"). The *Employment Standards Act* generally applies to all employees, however certain types of employees are excluded. Those exclusions are listed in the *Exemption Regulations*, PEI Reg EC74/17). For example, the current version of the *Exemption Regulations* exempts Athletes, while engaged in their athletic endeavours, from certain sections of the *Employment Standards Act*

The *Employment Standards Act* establishes the minimum standards for employment in PEI, such as the rules relating to hours of work, vacation, public holidays, wages, and leaves of absence. While an employer can provide an employee with rights that are greater than the minimums articulated in the *Employment Standards Act*, they are not entitled to impose anything that falls below those minimums. If an employment contract purports to give an employee rights that are less than those articulated in the *Employment Standards Act*, then those provisions of the contract will be declared void as against public policy. Depending on the circumstances, there is common law to suggest that attempting to provide less than those articulated minimums could result in the entire contract being declared void.

In addition to the *Employment Standards Act*, there are other provincial laws that are relevant to the employment relationship, including: the *Human Rights Act,* RSPEI 1988, c H-12 (the "*Human Rights Act*"), the *Labour Act*, RSPEI 1988, c L-1 (the "*Labour Act*"), the *Occupational Health and Safety Act,* RSPEI 1988, c O-1.01 (the "*Occupational Health and Safety Act*"), and the *Workers' Compensation Act,* RSPEI 1988, c W-7.1 (the "*Workers' Compensation Act*"). Employers are also subject to the regulations accompanying these Acts. The relevance of these laws will be addressed in more detail below. Depending on the industry in which the employer operates, there may also be legislation that the employer is subject to which is specific to that industry.

*The Collective Agreement*

If a workplace is unionized and employees are members of a bargaining unit, the collective agreement will govern the terms and conditions of employment. Collective agreements in PEI are governed by the *Labour Act* if the employer is subject to provincial jurisdiction, or by the *Canada Labour Code,* RSC 1985, c L-2 ("*Canada Labour Code*") if the employer is subject to federal jurisdiction.

Typically, collective agreements will address issues such as hours of work, work schedules, management rights, wages, hiring, discipline, layoffs, and termination. Not all collective agreements will contain the same provisions. The employer may be subject to several collective agreements depending on the makeup of the workforce. Consequently, it is important for an employer to review any applicable collective agreements before taking steps in relation to a position or an employee that is within the scope of a collective agreement. Failing to comply with the terms of a collective agreement could result in a union initiating grievance proceedings which, in turn, could lead to an award being issued against the employer.

## B. Discrimination (in the Hiring Process)

Employers may not discriminate based on the protected grounds enumerated in the *Human Rights Act*. Section 6 of the *Human Rights Act* states that an employer is not allowed to:

- refuse to employ or to continue to employ any individual on a discriminatory basis, including discrimination in any term or condition of employment; or because the individual has been convicted of a criminal or summary conviction offence that is unrelated to the employment or intended employment of the individual.

Discrimination is defined in the *Human Rights Act* as discrimination in relation to age, colour, creed, disability, ethnic or national origin, family status, gender expression, gender identity, marital status, political belief, race, religion, sex, sexual orientation, or source of income of any individual or class of individuals. Discrimination may be direct, or indirect because it imposes an adverse effect by excluding, restricting, or preferring some persons because of a protected ground set out in the *Act.* The Act expressly prohibits employers from eliciting information about any of the protected characteristics of an applicant through statements made in job advertisements or application forms.

There are exceptions in the *Human Rights Act* to the general prohibition against discrimination. The prohibition against discrimination does not apply if the limitation, specification, or preference is based on a genuine occupational qualification, or on employment where a disability is a reasonable disqualification, or employment is within an exclusively religious or ethnic organization that is not operated for private profit and is operated primarily to foster the welfare of a religious or ethnic group, where age, religion, creed, color, race, sex, sexual orientation, marital status, family status, physical or intellectual disability, political belief, source of income, or ethnic or national origin is a reasonable occupational qualification, such a limitation is prohibited by law.

The prohibition against discrimination in the employment context includes the hiring process. Allegations of discrimination can arise because of the hiring process in several ways. One common source of such allegations relates to the wording used in employment postings/applications. Unsuccessful candidates for employment may, for example, argue that they were discriminated against because certain requirements were listed in an employment application or questions were asked in an application or interview regarding a protected ground. Employers should be wary of including such requirements or questions regarding any of the enumerated protected grounds of discrimination in employment advertisements, applications, or interviews. Such requirements or questions should only be included if they relate to a *bona fide* occupational requirement ("BFOR"). An employer bears the onus of establishing the BFOR on a balance of probabilities by demonstrating that the standard, factor, requirement, or rule:

- was adopted for a purpose or goal that is rationally connected to performing the job;
- was adopted in good faith, in the belief that it is necessary to fulfill a legitimate work-related purpose; and
- is reasonably necessary to accomplish the work-related purpose.

To show that the standard, factor, requirement, or rule is reasonably necessary, the employer must show that it is impossible to accommodate individual employees sharing the characteristics of the claimant without imposing undue hardship upon the employer.

## C. Employment Applications

- ***Permissible Inquiries***

The *Human Rights Act* prohibits an employer from using or circulating an application form, or making an inquiry in connection with employment, that expresses either directly or indirectly any limitation, specification, or preference, or that requires an applicant to furnish any information as to a prohibited ground of discrimination. The *Human Rights Act* also prohibits an employer from using an employment agency to discriminate against persons seeking employment based on protected grounds in the hiring or recruitment process.

Beyond those prohibitions, there are no statutory or common law rules regarding how an employer is required to hire an employee in a non-unionized workplace. In unionized workplaces, collective agreements may contain provisions that are relevant to the hiring process. For example, a collective agreement could state that an employer is required to fill new positions within a bargaining unit based on seniority. Employers should therefore review any applicable collective agreements and take the appropriate steps before hiring an employee.

The hiring process and creation of the employment relationship are governed generally by common law contract principles. As with any contract, the fundamental requirements for creating the employment relationship are offer, acceptance, and consideration. An employment contract is not concluded until there is an offer of employment made by an employer, a corresponding acceptance of that offer made by the employee, and a mutual

exchange of consideration, which is typically payment of a salary by the employer in exchange for the employee performing work.

## D. Use of Employment Contracts

Parties to all employment relationships have an employment contract with one another whether written or not. Employment contracts can be oral or implied, and do not need to be in writing to exist. However, for the terms of a contract to be enforceable, and relied upon if there is a dispute, the terms of the contract should be reduced to writing.

To avoid uncertainty and minimize the employer's exposure to risk, it is recommended that employers prepare written employment agreements that are specific to the employment relationship to be created. A written agreement is an opportunity to clearly establish the terms and conditions of employment, such as the employee's position, job duties, hours of work, remuneration, and performance expectations. A written employment agreement also provides the employer with an opportunity to protect its interests and minimize its liability if the employment relationship comes to an end. Depending on the nature of the employment position, the agreement can include restrictive covenants that limit an employee's ability to compete with the employer or solicit the employer's clients or employees away from the employer's business. Confidentiality clauses serve to protect the unauthorized use or distribution of the employer's proprietary information following termination of the employee.

Perhaps the greatest value to an employer from having a properly drafted employment contract in writing is the ability to limit an employee's entitlement to notice or pay in lieu of notice upon termination without cause. Without this, termination can have uncertain and expensive implications for an employer, as it is up to the common law and a court to determine the appropriate notice entitlement for a without cause termination.

When preparing a written employment agreement, employers must remember that the agreement will be subject to both the common law and any applicable legislation. Any employment agreement must at the very least comply with any minimum standards articulated in legislation, such as the *Employment Standards Act*. Written employment agreements will be interpreted strictly by the courts, and any uncertainty will be interpreted against the party who drafted the agreement. Written agreements are generally upheld as enforceable unless it is established that, for example, an agreement does not comply with legislated minimum standards, that it was signed under duress or without adequate consideration, or that it is unconscionable.

- *Mandatory arbitration clauses*

In a unionized workplace, the *Labour Act* states that every collective agreement shall contain a provision for the final and binding settlement by arbitration of all differences between the parties arising from the application, administration, operation, or alleged violation of the collective agreement. Unlike in a non-unionized setting, courts have held that employees subject to a collective agreement do not have recourse to the courts if the subject matter of a dispute falls either explicitly or implicitly under the ambit of the collective agreement.

- *Non-Disclosure Agreements/Non-Competes*

A written employment agreement also provides the employer with an opportunity to protect its interests and minimize its liability if the employment relationship comes to an end. Depending on the nature of the employment position, the agreement can include restrictive covenants that limit an employee's ability to compete with the employer or solicit the employer's clients or employees away from the employer's business.

On November 17, 2022, the government of Prince Edward Island passed the *Non-Disclosure Agreements Act* (the "*NDA Act*"), which is intended to regulate the content and use of non-disclosure agreements. This is the first kind of legislation in Canada to impose limits on the use of NDAs, including in the labour and employment law context.

While the Courts' interpretation and application of the *NDA Act* remains to be seen, it is clear that the law applies to situations where a "party responsible" for harassment and discrimination against a victim is found responsible for such actions, that it is restricted and sometimes prohibited from entering into an NDA, unless it is the "expressed wish and preference" of the victim.

Confidentiality clauses serve to protect the unauthorized use or distribution of the employer's proprietary information following termination of the employee. For more on non-competes, please see Section VII.B.—Covenants Not to Compete, below.

## E. Advertising/Recruitment

*The Human Rights Act prohibits an employer from publishing any advertisement in connection with an employment opportunity or prospective employment that is based on a discriminatory ground. There are no other legislative requirements that govern how* employers must advertise for positions. In unionized workplaces, there are sometimes provisions in the collective agreement that govern how employment positions must be advertised.

Pursuant to the *Employment Standards Act,* employers are prohibited from seeking information regarding pay history from job applicants.

As of 2022, Prince Edward Island has instituted new rules for pay transparency, which include the following rules under the *Employment Standards Act:*

- Employers who publish publicly advertised job postings must include information about the expected pay for the positions or the range of expected pay for the positions

- No employer or person acting on behalf of an employer shall intimidate, dismiss or otherwise penalize an employee or threaten to do so because the employee has:

    - made inquiries to the employer about the employee's pay, or made inquiries or requested information relating to the employer's pay policies,

    - disclosed the employee's pay to another employee,

- given information about the employer's compliance or non-compliance with the requirements of the Pay Transparency provisions to the Inspector or other Department staff, or

- asked the employer to comply with the Pay Transparency provisions.

Of note, the rules do not apply to unionized work environments where the pay range is depicted in a collective agreement, and only apply to advertisements for specific positions, that is to say that they do not apply to general recruitment campaigns.

### F. Background Checks/ Employment References

Employers often perform background checks as part of the hiring process. There are no legislative or common law prohibitions on background checks in PEI, however, employers should be aware that not all employers may be willing to provide references for former employees.

There is case law and jurisprudence from other jurisdictions in Canada which establishes that background checks, particularly financial and/or criminal background checks, should only be used when they are "reasonably" required for establishing an employment relationship. What is "reasonable" depends on the circumstances of the employment position. Employers should exercise caution in the collection and use of personal information, and ensure appropriate measures are in place to maintain confidentiality and respect employees' privacy. Breaches of an employee or applicant's privacy may result in that person bringing an action against an employer, including commencing a claim for damages.

## II. COMPENSATION

### A. Minimum Wage

The minimum wage rates in PEI are implemented individually through the *Employment Standards Act*. The *Employment Standards Act* requires the Employment Standards Board to review the minimum wage rate each year. It makes recommendations on the minimum wage rate based on economic factors in the province and on input received from the public and stakeholders.

As of April 1, 2024, the minimum wage rate for employees in PEI is $15.40 per hour. On October 1, 2024, the minimum wage will increase to $16.00 per hour.

### B. Wage Payments & Deductions

The *Employment Standards Act* requires employers to pay their employees at intervals that are not more than 16 days apart, and not more than five working days after the end of the pay period. On each payday, the *Employment Standards Act* requires the employer to provide a written wage statement containing the following details: the name and address of the employer and the name of the employee; the period of time or the work for which wages are being paid; the rate of wages the employee is entitled to and the number of hours worked; the gross amount of wages an employee is entitled to; the amount and purpose of each deduction; any bonus, gratuity, living allowance, or other payment the employee is

entitled to; and the net amount of money being paid to the employee.

Employers must arrange for payment either by cash, cheque, money order, or direct deposit to an account of the employee's choice. The employer is entitled to make certain deductions from an employee's earnings, specifically: (a) deductions required by provincial or federal legislation; (b) amounts ordered to be deducted or withheld by an order of a court; (c) deductions related to a group benefit plan that the employee participates in; (d) savings plan deductions requested by the employee; or deductions resulting from a previous advance of pay to the employee.

## C. Minimum Age/Child Labor

There is no statutory minimum age for employment in PEI; however, there are limitations on where and how children under the age of 16 may work. The *Youth Employment Act*, RSPEI 1988, c Y-2 ("***Youth Employment Act***") governs these statutory limitations on child labour in PEI. No child under the age of sixteen may be employed in the construction industry or in any other line of employment that is likely to be harmful to the child's health, safety, or moral and physical development. Further, children under the age of sixteen may not be employed between 11:00 p.m. and 7:00 a.m.; may not be employed during normal school hours; and may not be employed for more than three hours on a school day, more than 8 hours on any day other than a school day, and more than forty hours in any week. The ***Youth Employment Act*** also places obligations on the Employer to reasonably assign work duties to identify and avoid potential danger; to ensure that a child under the age of sixteen is supervised at all times; and to provide adequate training and courses before allowing a child under sixteen years of age to perform any work.

## D. Overtime Requirements

The *Employment Standards Act* provides that, after 48 hours of work in a given week, an employee is entitled to time and one-half of his or her regular hourly rate for each overtime hour of work performed by the employee for the employer during a work week. Where an employee performs one or more overtime hours of work for the employer during a work week, the employer may, instead of paying the employee for that work, give the employee one and one-half hours of paid time off work for each overtime hour worked. To avail of this option, the employee must request such compensation in writing and the paid time off work must be taken by the employee within three months of the work week in which the overtime was earned.

## E. Workday/Workweek/Work hours

The *Employment Standards Act* provides that the standard workweek in PEI is 48 hours. The Employment Standards Board, however, has the authority to exempt certain employers or industries from the standard workweek provisions in the *Employment Standards Act* based on the following considerations:

- The seasonal nature of the work;
- The effect of extended hours on the health and safety of employees and the public;

- Work requirements that include the need to have employees at work, but not always engaged in work-related activities; and

- The duration proposed by an employer or that is customary in the industry.

The *Act* requires an employer to provide each employee with a rest period of at least 24 consecutive hours in every seven-day period and, wherever possible, to provide that rest period on a Sunday. An employer also must provide a 30-minute rest or eating period such that no employee works longer than five consecutive hours.

### F. Benefits/Health Insurance

There is no statutory requirement for an employer in PEI to provide health insurance to their employees. Employers may opt to provide health, dental, and/or vision insurance benefits to their employees, but there is no legal obligation to do so.

Employers in PEI, subject to a few exceptions, are generally required to participate in the workers' compensation statutory insurance scheme set out in the *Workers' Compensation Act*.

## III. TIME OFF/LEAVES OF ABSENCE

### A. Paid Time Off

- *Vacation Pay*

After one year of continuous employment, an employee with less than eight years of continuous employment with the employer is entitled to two weeks of vacation and an employee with eight years or more of continuous employment is entitled to three weeks of vacation within the four months following the end of the one-year work period. Employees receive vacation pay of at least 4% of their wages if employed for less than eight years, and 6% of their wages if employed for at 8 years or more of continuous employment with the employer. Vacation pay must be paid at least one day before the vacation period begins.

The entitlement to vacation leave is exclusive of any vacations for statutory holidays. Where a statutory holiday falls during the vacation period, an extra day will be added to the vacation period.

Unless the employer and the employee agree upon shorter periods, an employer is required to give an employee his or her annual vacation in one unbroken period. For employees entitled to three weeks of leave, the employee is permitted to take the leave in one unbroken period of three weeks, two unbroken periods of two weeks and one week respectively, or three unbroken periods of one week each.

The employer has the authority to decide when an employee must take his or her vacation leave. However, many employers allow their employees to choose when they will take their vacation leave. The employer must give the employee not less than one week's notice of the dates of the annual vacation.

- *Sick Leave Pay*

The *Employment Standards Act* provides for a period of leaves of absence without pay of up to three days, in total, during a twelve-month period provided the employee has been employed by an employer for a continuous period of three months or more. Where an employee requests a leave that is three consecutive days in length, the employer may require the employee to provide a certificate signed by a medical practitioner.

Where an employee has been employed by the same employer for a continuous period of at least twelve months, an employee is entitled to one paid day of sick leave at their regulate rate of pay during a twelve-month period in addition to any unpaid leave that the employee is entitled to. After an employee has been employed by the same employer for a continuous period of at least twenty-four months, the employee becomes entitled to two paid sick days for year and after thirty-six months they become entitled to three days of paid sick leave.

Employees are not permitted to carry over unused paid sick days to the following calendar year and employees are entitled to take any available paid sick leave days before unpaid days.

- *Holiday Pay*

The *Employment Standards Act provides that employees in PEI are entitled to time off with pay for each of the following public holidays:* New Year's Day; Islander Day; Good Friday; Canada Day; Labour Day; National Day for Truth and Reconciliation; Remembrance Day; Christmas Day; and a day prescribed as paid holiday in the regulations.

Employees are not entitled to paid holidays where they: have been employed for less than 30 days prior to the paid holiday; have not received pay for at least 15 of the 30 calendar days immediately preceding the paid holiday; have failed, without just cause, to work their scheduled regular day of work immediately preceding or following the holiday; have agreed to work on the paid holiday but, for no reasonable cause, fail to report to and perform work; or are employed under an agreement whereby they elect to work when requested to do so.

Where an employee is required to work on a paid holiday, the employer must either pay the employee time and one-half of his or her regular rate of pay for working the holiday in addition to one day's pay at the employee's regular rate, or pay the employee his or her regular rate of pay for the day worked and grant him or her a holiday with pay on another day agreed upon between the employer and employees

- *Other*

*Workers' Compensation*

The *Workers' Compensation Act* establishes an insurance scheme which requires certain employers in PEI to obtain coverage for workplace-related incidents. The need to obtain workers' compensation insurance coverage is subject to many exceptions, which are outlined in the *Workers' Compensation Act General Regulations*, PEI Reg EC831/94.

Of note, the following classifications of employment are excluded from compensation under

the insurance scheme: artists, entertainers or performers; circus operations, travelling shows and trade shows; clergy; demonstrating and exhibiting; employment by a person in respect of a function in the private residence of that person; carriers employed in delivering newspapers or other publications; peddling or door-to-door sales; salespersons who are not restricted to selling goods for one manufacturer or supplier; selling or similar canvassing on streets; sports professionals, sports instructors, players and coaches; volunteer workers; outworkers; elected officials of a city, town or municipality; presidents, vice-presidents, directors and other officers of a company; transportation by taxi; farming; and fishing.

This insurance scheme provides certain benefits to employees who are injured in workplace injuries. Specifically, under the *Workers' Compensation Act*, employees are entitled to wage loss benefits for lost income attributable to his or her loss of earning capacity resulting from a personal injury by accident arising out of and in the course of employment. Compensation is also provided to the dependents of qualified workers who die because of such an injury.

The workers' compensation system is funded through the payment of premiums by employers with coverage. Employers receive the benefit of removing the possibility that employees could commence proceedings in relation to any covered workplace injuries or illnesses.

The insurance scheme and its related elements are operated by the Workers Compensation Board of PEI. If the employee is deemed by the Commission to be fully capable of working, then the employee is no longer eligible for benefits. The insurance scheme covers the costs of medical aid as required because of a workplace injury, including hospital care, medical attention, medication and surgery, in addition to other required benefits and treatments such as physio or occupational therapy. Where the accident is attributable solely to the serious and willful misconduct of the worker, as determined by the Board, wage loss benefits and medical aid are not payable in respect of the three weeks from the day following the loss of earning capacity and three weeks from the day the worker requires medical aid.

It is important to keep in mind that coverage for injuries may extend beyond the four walls of an employer's facility and may (depending on the circumstances) include injuries sustained while travelling from or to the workplace. Conversely, certain injuries sustained in an employer's physical workplace may not be insured.

In the instance of a workplace injury or illness, the employee, the employee's medical care providers, and the employer are required to provide reporting forms to the Board. The Board then confirms if the employee is covered. Where there is proper workers' compensation coverage for the employee, and the injury arose out of or during the employment, the claim is processed to determine the appropriate compensation benefits for the employee.

An employer is required to cooperate in the early and safe return to work of a worker injured in his or her employment by:

- contacting the worker as soon as possible after the injury occurs and maintaining communication throughout the period of the worker's recovery;

- providing suitable employment that is available and consistent with the worker's functional abilities and that, where possible, restores the worker's pre-injury earnings;

- giving the Board any information it may request concerning the worker's return to work; and

- doing any other things that may be prescribed in the regulations to the *Workers' Compensation Act*.

The worker also must cooperate in his or her early and safe return to work by maintaining contact with the employer, assisting in finding accommodative jobs, and accepting suitable employment.

Employees and employers have the right to have a decision reconsidered by the Board upon request. The request must be submitted not later than 90 days of receiving notification of the decision of the Board.

Once the Board reconsiders the decision, the Board may confirm, vary, or reverse the decision. Following that process, any person having a direct interest in the decision may appeal the decision to the Appeal Tribunal within 30 days after the date the Board makes a decision.

The appeal tribunal will review the application and, where it is determined that reconsideration is appropriate, shall hear the appeal. Within 90 days of the completion of the hearing of an appeal, the appeal tribunal may decide to confirm, vary, or reverse the decision made by the Board, and must provide a written copy of its decision to any person with a direct interest in the matter. Decisions of the appeal tribunal may be appealed to the Prince Edward Island Court of Appeal on a question of law or jurisdiction if leave to appeal is granted by the Court. The application for leave to appeal must be made within 30 days of the decision of the appeal tribunal.

## B. Leaves of Absence

### *Family Leave*

The *Employment Standards Act* provides that, where an employee has worked for a continuous period of six months or more, the employer will grant the employee a leave of absence without pay for up to three days, during a 12-month calendar period, to meet responsibilities related to the health or care of a person who is a member of the immediate family or extended family of the employee.

### *Bereavement Leave (Death in the Family)*

On the death of a member of the immediate family or extended family of an employee, the *Employment Standards Act* provides that the employer shall grant to the employee a leave of absence of one day of paid leave and up to two consecutive days of unpaid leave, if the deceased person was a member of the immediate family of the employee. . Immediate family includes a spouse, child, parent, brother, or sister of an employee.

If the deceased person was a member of the extended family of the employee the Employer shall grant up to three consecutive days of unpaid leave Extended family includes grandparent, grandchild, brother/sister-in-law, mother/father-in-law, son/daughter-in-law, aunt/uncle of the employee.

Effective November 17, 2021, employees who experience a prenatal pregnancy loss or stillbirth are entitled to bereavement leave in the same manner as those who have lost an immediate family member. An employee who is the spouse, partner, or intended parent of a child born as a result of a surrogacy is also entitled to this leave where there is a prenatal pregnancy loss or stillbirth.

*Compassionate Care Leave*

The *Employment Standards Act* provides for compassionate care leave for employees. Every employer is required to grant an unpaid leave of absence of up to 28 weeks to an employee for providing care and support to a family member of the employee that has a serious medical condition with a significant risk of death within 26 weeks. The employee must obtain a certificate from a medical practitioner to confirm this.

The leave must commence on either the first day of the work week for which the certificate was issued, or where the unpaid leave of absence was commenced before the certificate was issued, the first day of the work week in which the leave was commenced. The leave may be broken up but must be taken in minimum blocks of one week. The leave ends on the last day of the work week in which the family member dies, or immediately after the expiration of 26 work weeks following the first day of the work week in which the leave commenced. For purposes of this compassionate care leave, a family member includes a member of the immediate or extended family of the employee, a niece, nephew, foster parent, ward or guardian of the employee, and any person who the employee considers to be like family.

*Leave Related to a Critically Ill Child*

The *Employment Standards Act* also provides critically ill child care unpaid leave of up to 37 weeks to provide care or support to a critically ill minor child where a certificate is issued by a medical practitioner stating that the child is critically ill and requires the care or support of the employee and sets out the period during which the child requires care or support. An employee must work for the same employer for at least three months to be entitled to such leave and must also be the parent, adoptive parent, guardian, or spouse of the parent of the child. An employee's entitlement to unpaid leave under this section ends upon the death of the child or when the employee has taken 37 weeks of unpaid leave of absence under this section.

*Leave for Crime Related Disappearance or Death of a Child*

The *Employment Standards Act* also provides crime-related child death or disappearance unpaid leave of up to 52 weeks in the employee is the parent of a child who has disappeared, and it is probable, considering the circumstances, that the child disappeared because of a crime. If the child has died because of crime, the period of unpaid leave is up to 104 weeks. An employee must have worked for the same employer for at least three

months to be entitled to the leave of absence.

*Reservist Leave (Military Service)*

Reservists are entitled to an unpaid leave under the *Employment Standards Act* for a period of service, meaning active duty or training. The entitlement to leave is the period necessary to accommodate the period of service. To be entitled to this leave, an employee must be a member of the reserves, have been employed by the same employer in civilian employment for a period of at least three consecutive months, and is required to be absent from work for that service.

The employee must provide as much notice to the employer as is reasonable in the circumstances including the anticipated start and end date of the leave. The notice must be in writing. If the employer requests it, the employee must provide verification of the need and duration of the period of service for the purpose of training or active duty.

*Disability Leave*

Disability leave is not regulated by statute in PEI except in the case of workplace injuries, which are generally covered by the *Workers' Compensation Act* It is important to ensure compliance with the *Human Rights Act* in addressing disability leave, including accommodating a disability up to the point of undue hardship. In cases of disability, it is also prudent for employers to consider the availability of other leaves discussed in this Section.

*Pregnancy Leave/Parental Leave/Adoptive Leave*

Under the *Employment Standards Act*, an employee who has been continuously employed for 20 weeks is entitled to take unpaid pregnancy leave for a period not exceeding 17 weeks. The employee must request this leave at least four weeks before the commencement of the leave and must provide a certificate from a qualified medical practitioner. The 17-week leave may begin any time during the period of 13 weeks preceding the estimated date of birth. The employee is entitled to not less than six weeks leave after the actual birth date.

Employees who have been continuously employed for 20 weeks or more also are entitled to unpaid parental leave if they: are the natural parent of a child; assume actual care and custody of a child for the purposes of adoption; or adopt or obtain legal guardianship of a child under the law of a province. The period of unpaid parental leave is up to a continuous period of 62 weeks. Parental leave begins on the day the child is born or on which the child first comes into the custody of the employee, whichever is later.

Leave under this section can be extended an additional five consecutive weeks if your child has a physical, psychological, or emotional condition that requires additional parental care. This must be taken immediately following the end of the leave.

*Court Leave*

Employees are entitled to unpaid leave if they serve on a jury or the court requires them to appear as a witness.

*Domestic Violence, Intimate Partner or Sexual Violence Leave*

Under the *Employment Standards Act*, this section provides employees up to three days of paid leave and an additional seven days of unpaid leave in a 12-month period, to address the consequences of domestic violence, intimate partner violence or sexual violence. This can be taken intermittently or all at once. Employees must be employed consequtively for three months with the same employer to be eligible for this leave. Employees must inform their employer of their intention to use this leave. Employers can request written evidence respecting the employee's need for the leave.

*Emergency Leave*

Under the *Employment Standards Act*, emergency leave applies when a government agency declares an emergency under the following:

- A state of emergency under the *Emergency Measures Act;*
- A public health emergency under the *Public Health Act;*
- A direction or order of a public health official or the Chief Public Health Officer prevents the employee from attending work;
- An emergency or quarantine under the federal *Emergencies Act or Quarantine Act*
- Additional situations can be defined as an emergency through regulations under the *Employment Standards Act.*

If an employee is unable to return to work because of restrictions that have been placed on schools or childcare centres, such as a public health emergency or state of emergency, they may be able to use this leave. To qualify for the leave for emergencies affecting family members all of the following conditions must be met:

- A declaration, direction, order or other circumstance directly applies to the family member of the employee
- The family member of the employee requires care or assistance
- The employee is the only person reasonably available to provide the care or assistance
- Providing the care or assistance prevents the employee from performing their work-duties

Leave under this heading ends when the employee is no longer able to work because of the emergency, no longer needs to care for family member affected by th emergency, or the emergency ends.

## IV. DISCRIMINATION & HARASSMENT

### A. Discrimination

- *Protected Classes*

Discrimination is defined in section 1(d)of the *Human Rights Act* as discrimination in relation to age, colour, creed, disability, ethnic or national origin, family status, gender expression, gender identity, marital status, political belief, race, religion, sex, sexual orientation, or source of income of any individual or class of individuals. Discrimination may be direct, or indirect because it imposes an adverse effect by excluding, restricting, or preferring some persons because of a protected ground set out in the *Human Rights Act*. The *Human Rights Act* expressly prohibits employers from eliciting information about any of the protected characteristics of an applicant through statements made in job advertisements or application forms.

*Complaints Under the Human Rights Act*

An employee or job applicant may file a complaint to the Prince Edward Island Human Rights Commission in relation to any alleged discriminatory conduct. Complaints must be filed by the complainant within one year of the alleged contravention. In the case of an alleged continuing contravention of the *Human Rights Act*, the complaint must be filed within one year after the last incidence of the alleged contravention. The process for adjudicating complaints is articulated in the *Human Rights Act*. It provides the opportunity for the respondent employer to file a response to the complaint in accordance with a specific format and deadline.

The Commission encourages the complainant and respondent to develop their own solution through discussion instead of having a resolution imposed by the Commission when it is feasible to do so under the circumstances of the complaint. The Commission will attempt to assist the parties and can provide mediation services.

If the parties do not agree to mediation, or if the complaint is not resolved, the file is given to the Executive Director to commence an investigation and attempt to settle the complaint. The investigation usually includes interviews with the parties, witnesses, and experts, and the gathering of documents and materials. When the investigation is completed, the Executive Director may prepare an investigation report detailing the complaint, the response, and the information gathered during the investigation. The report is sent to both parties who have 30 days to submit further comments.

Under the *Human Rights Act*, the Executive Director has the power to dismiss a complaint at any time if he or she believes the complaint is without merit, or if in the opinion of the Executive Director, the complainant has refused to accept a proposed settlement that is fair and reasonable. If the Executive Director dismisses or discontinues the complaint, the complainant has the option of asking the Chairperson of the Commission to review the Executive Director's decision. The Chairperson reviews the request and either upholds the Executive Director's decision or decides to send the complaint to a public panel hearing.

If the Chairperson agrees with the Executive Director's decision to dismiss or discontinue the

complaint, the complainant has 30 days from the date of the decision to file an application with the Supreme Court of Prince Edward Island Trial Division to have a judicial review of the Chairperson's decision.

If the Executive Director recommends to the Chair that a complaint be sent to a panel hearing, or if the Chair decides to send a complaint to a panel hearing after reviewing the Executive Director's decision to dismiss the complaint, a time and place for the hearing is scheduled. The Chairperson forwards the complaint to a human rights panel consisting of one or more Commissioners of the Commission.

The hearing is open to the public, unless the panel determines that the hearing should be held in private. Prior to the hearing, each party must submit any documents and written submissions on fact and law that they intend to rely on at the hearing. At the hearing, each party may call witnesses and make oral submissions. The proceedings at human rights panel hearings are more relaxed than in a civil trial. Neither party is required to have legal counsel for a panel hearing. If they wish, they can seek legal counsel at their own expense, and many employers choose to be represented by counsel.

At the completion of the hearing, the panel reviews the submissions and completes a written decision that is final and binding on both parties. If the panel finds that the complaint is without merit, it may dismiss the complaint. If the panel finds that the complaint has merit, in whole or in part, the panel may make an order against the respondent. The human rights panel has the power to file an order with the Supreme Court of Prince Edward Island Trial Division to make the order enforceable by law.

Either party has 30 days from the date of the panel decision to file an application with the Supreme Court of Prince Edward Island, if they wish to have a judicial review of the decision. The Court can confirm, reverse, or vary the decision and orders of the panel.

For a complaint to not be dismissed at the outset, an employee or job applicant who alleges discrimination must first establish a prima facie case of discrimination. This is done when the complainant presents evidence that: (a) confirms the allegations that have been made, and (b) that, if believed, is complete and sufficient for a decision to be made in favour of the complainant, in the absence of an answer from the respondent.

While a complainant has the initial burden of establishing prima facie discrimination, employers have an obligation to promptly investigate allegations of discrimination when they first arise. If there are findings of discrimination made because of the employer's own investigation, then that employer is tasked with taking the appropriate disciplinary steps against the parties involved.

Once a prima facie case is established. The onus shifts to the employer to provide a satisfactory explanation demonstrating that either the conduct did not occur as alleged or was non-discriminatory in nature. Conduct may be found to be non-discriminatory if the employer is able to establish that accommodating the complainant's needs would impose an undue hardship on the employer.

## B. Harassment and Bullying

The *Employment Standards Act* protects employees against sexual harassment in and away from the workplace. The *Employment Standards Act* defines sexual harassment as any conduct, comment, gesture, or contact of a sexual nature that is likely to cause offence or humiliation to an employee, or that might, on reasonable grounds, be perceived by the employee as placing a condition of a sexual nature on employment or on any opportunity for training or promotion. An employer is required to make every reasonable effort to ensure that no employee is subjected to sexual harassment, including issuing a harassment policy. Such a policy must include information as to what activities an employer will not tolerate as being harassment, and the process by which employees can make complaints of sexual harassment at the workplace.

Harassment other than sexual harassment occurs when someone is subjected to unwelcome verbal or physical conduct. Harassment is prohibited under the *Human Rights Act* if it is based on a prohibited ground of discrimination enumerated in the *Human Rights Act* as discussed in Section I.B – Discrimination. Harassment is also prohibited under the *Occupational Health and Safety Act*, RSPEI 1988, c O-1.01 and its regulations. It requires that employers have a written harassment prevention policy and an appropriate method to investigate and address complaints, among other things.

Employers are vicariously liable for the acts of their employees. Employers are therefore legally responsible for actively discouraging and prohibiting harassment and discrimination in the workplace. An employer's liability for discrimination and harassment is not strictly limited to conduct which takes place in the workplace or during normal working hours. It can include conduct that takes place offsite or after hours, but which can be shown to be related to or associated with employment.

PEI legislation does not address workplace bullying. However, employers should implement workplace policies that address bullying in the workplace. For more details, please contact us.

# V. TERMINATION/DISMISSAL ISSUES

## A. Overview

An employee's relationship with an employer can end in several ways. In many instances, the end of this relationship will be without incident or protest from either party. For example, where the relationship ends because of the expiry of a fixed term contract, as a result of a retirement, or by agreement.

## B. Justification for Dismissal

In contrast, there are certain situations which are more likely to generate disputes between an employer and an employee. Situations where an employer unilaterally chooses to terminate the relationship may, for example, generate a significant amount of controversy. The friction in these situations will typically surround (a) the employer's cause for terminating the employee, and (b) the employee's entitlement to severance or notice. The

following section will provide an overview of some of the issues that arise in these more contentious situations.

The distinction between termination with or without cause is of major significance. Notably, it dictates whether an employee is entitled to any severance or notice from an employer. An employer may allege termination with "just cause" when the employee has engaged in conduct which effectively amounts to a repudiation of the employment contract. Employers are not required to provide any notice of termination, or pay in lieu of notice, if termination is with "just cause".

The *Employment Standards Act* does not contain an express definition of termination with cause or without cause. Established precedent at common law gives rise to the definition. The assessment of just cause requires a contextual analysis of the circumstances surrounding the conduct. The decision to terminate must be shown to be proportional to the employee's conduct. For example, just cause is often established in cases where an employee has engaged in serious misconduct such as theft, assault, or sexual harassment. The employer has the onus of showing that it dismissed an employee for just cause. If there is no repudiation of the contract by the employee and the employer merely chooses to end the relationship, then the termination will be found to have been without cause.

Employees may be terminated because of performance issues, although it bears noting that performance issues on their own may not be insufficient to establish just cause. Employers are typically required to advise the employee of the performance issue and warn the employee that failure to remedy the performance issue could result in termination. Employers may also implement progressive discipline regimes where the level of sanction imposed on an employee increases because of repeated performance issues.

If an employer condones an employee's inappropriate behavior or fails to discipline the employee, then the employer may be unable to justify a termination for just cause.

A termination will be "wrongful" when an employer has terminated employment "without cause" and has not provided the requisite reasonable notice or alternatively, when an employer has asserted "just cause" but has consequently failed to prove that there was "just cause" on a balance of probabilities.

## C. Mandatory Separation Pay

Employers are not required to provide any notice of termination, or pay in lieu of notice, if termination is with "just cause." If an employee is terminated without cause, or if an employer does not believe they could establish that the employee was dismissed for just cause if challenged in court, then the employee is entitled to written notice of termination or pay in lieu of notice. There is no severance payment required by statute in addition to notice or pay in lieu of notice. However, notice encompasses all regular benefits of employment during that period. Please see Section VI.B—Mandatory Notice Periods, for more information on minimum notice requirements for "without cause" termination.

The *Employment Standards Act* outlines minimum notice periods for employees based on their years of service with an employer. Employees who are terminated may have common law rights that are separate and distinct from the statutory requirements provided for in the

*Employment Standards Act*. An employee will often be entitled to more notice or severance at common law. Reasonable notice is based on several factors, including: the employee's age, length of service, professional status and experience, seniority and responsibility, salary, and the availability of comparable alternative employment. These factors are not exhaustive, and a Court may also consider other matters which may extend the notice period, such as whether the employee was induced to leave his or her employment, or the current economic climate.

Some employers elect to include contractual clauses that limit the amount of severance or notice to which an employee is entitled. Any provision that purports to provide an employee with less than the amount of notice required by the *Employment Standards Act* will be invalid and struck down by the Courts. There is case law in some Canadian jurisdictions that has found the entire agreement, not just the clause or provision in question, will be invalid. Provisions that state that an employee is only entitled to the minimum amount under the *Employment Standards Act* have been subject to a significant amount of scrutiny. In many cases, Canadian courts have refused to enforce these contractual provisions and have awarded an employee damages in line with the common law. Central to many of these cases was the element of uncertainty regarding the notice entitlements and whether the agreements were drafted in such a way that it was clear that the employee was waiving his or her right to common law notice. This concept is evolving. Employers should therefore be cautious and obtain legal advice when including such provisions in employment agreements.

The case law is clear that the common law rules regarding notice apply to situations where an employee has an indefinite term contract. Matters become more complicated where an employment agreement is for a fixed term. In most cases, termination of a fixed term contract before the end of the term will result in the employee being entitled to damages equal to the remaining value of the contract. In some cases, an employee may be able to argue that he or she is entitled to common law reasonable notice at the end of a fixed-term contract. For example, if an employee has worked successive fixed-term contracts, or in the absence of a provision that is explicitly clear that the employee has waived his or her right to common law notice, the employee may successfully argue that severance should be calculated in accordance with the common law, and not based on the term of the contract. Again, it is important for employers to exercise caution when entering employment agreements and to obtain appropriate legal advice.

## D. Use of Separation Agreements and Releases

- *Releases/Waivers*

An employer and a departing employee may enter into a separation agreement outlining the terms of the employee's departure. This typically includes a release of all claims, which is generally agreed to when the parties have resolved outstanding issues. These agreements, like any other contract, must include an offer, acceptance, and consideration.

Separation agreements are generally enforceable in PEI provided that the agreement is not signed under duress and is not so unfair as to be considered unconscionable. To be enforceable, employers must ensure that there is consideration given for having the

employee sign the agreement and release the employer from future liability.

The consideration must be something in addition to the statutory notice entitlement and any severance entitlement which the employee is already entitled to either under statute or his or her employment agreement. Employers should encourage an employee to obtain independent legal advice before signing the agreement to avoid claims that the agreement was signed under duress

## E. Legal Challenges to Dismissal

- *Constructive Discharge*

Another form of "wrongful termination" arises if an employer changes a fundamental term or condition of an employee's contract without the employee's consent, or without adequate notice. The employee may be deemed to have been "constructively dismissed." Determining whether an employee was constructively dismissed requires an analysis of the terms of the employment relationship, and several other relevant contextual factors. Certain conduct will often lead to findings of constructive dismissal, including reductions in salary or changes in employment duties such as removal of responsibilities or decision-making authority. Abusive behaviour by the employer that makes working conditions intolerable can constitute grounds for constructive dismissal, as a fundamental implied term of any employment relationship is that the employer will treat the employee with civility, decency, respect, and dignity.

If an employee does not object to the "fundamental change" or "constructive dismissal" within a reasonable period, then the employee may be deemed to have acquiesced to the change and could lose the opportunity to claim damages for the alleged constructive dismissal.

- *Dispute Resolution Process /Forums*

If an employee disagrees with the termination of the employment relationship, there are several avenues of recourse available to the employee which the employer should be aware of. The most common recourse sought by employees is to commence a civil claim in court.

Both the Prince Edward Island Small Claims Court and the Supreme Court of Prince Edward Island, Trial Division have jurisdiction to adjudicate wrongful dismissal claims. The Small Claims Court has the power to hear civil actions where the monetary claim does not exceed $16,000. The Supreme Court has jurisdiction over all matters, including those where the damage claim exceeds $16,000, or where other relief, such as an injunction, is sought.

In addition to court proceedings, an employee may file a complaint with the Employment Standards Board, which is the administrative body responsible for the administration of the *Employment Standards Act* and its regulations. An employee may file a complaint alleging that an employer failed to comply with the *Employment Standards Act*. The Board has the authority to investigate and can issue an order to comply with the *Employment Standards Act*. Complaints regarding discrimination or harassment can be made to the Prince Edward Island Human Rights Commission as described above in Section IV.A - Discrimination.

In unionized workplaces governed by a collective agreement, an employee's options for recourse are based in the grievance process. The grievance process involves a forum where termination-related issues are grieved and resolved before an adjudicator. As the grievance process may vary from one collective agreement to another, employers operating in unionized workplaces should be familiar with the relevant provisions and requirements of any collective agreement before taking action.

*Calculating Damages for Wrongful Dismissal*

Once the notice period an employee is entitled to is determined, the next step is to calculate the value of the claim. Typically, most of the claim's value is the salary that the employee would have received for this period, but for his or her termination. Depending on the nature of the position and the provisions of the employment agreement, a court may find that the damages award should include pay raises, bonuses, overtime pay, benefits (such as medical or disability benefits), stock options, and other compensation that the employee would have been entitled to during the notice period.

The common law also recognizes that employees may claim damages for several other dismissal-related matters. One common claim for damages relates to concerns about the employer's conduct towards the employee. Employers are required to deal fairly and in "good faith" with their employees. If an employer breaches this duty of good faith, the employee may be entitled to damages. An example of a breach of the employer's duty of good faith may include acting in a high-handed manner that is untruthful, misleading or unduly insensitive. Allegations of bad faith typically arise because of the way an employee is terminated. Quantifying damages for breaching the duty of good faith will depend on several relevant factors, including the nature and severity of the employer's conduct and the impact that conduct had on the employee.

Another claim often advanced by employees involves allegations of discrimination based on a protected ground under the *Human Rights Act*. An employee may argue that he or she was terminated because of a characteristic protected under the *Human Rights Act*. If an employee establishes that the employer engaged in discriminatory conduct, the employee may be entitled to damages. Quantifying damages based on discrimination again depends on the nature and severity of the proven conduct. Employers should be aware that Human Rights Tribunals and Commissions across the country have substantially increased the quantum of damages in recent years to set an example that discrimination in the workplace will not be tolerated.

An assessment of the employee's efforts to mitigate his or her damages during the relevant notice period is necessary in order to determine if an employee is entitled to damages and what the quantum of damages should be. An employee who is wrongfully terminated has a duty to mitigate any damages resulting from a termination. This includes making reasonable efforts to search for and accept reasonable alternative employment. A court may reduce a damage award where the employer brings evidence showing that the employee failed to take sufficient steps to mitigate his or her damages. The employer bears the onus of proving a failure to mitigate. If the employee obtains alternative employment, including self-employment, the court usually deducts any amount earned from these sources during the notice period established by the court.

## F. Employment References

There is no statutory or common law obligation for an employer to prepare a confirmation of employment letter or to provide an employment reference for a terminated employee. However, should an employer refuse to provide a confirmation of employment or an employment reference, it may be more difficult for the employee whose employment has been terminated to mitigate his or her damages. This could increase the notice period as courts have recognized that an employer's refusal to provide a reference makes it more difficult for an employee to find alternate employment.

If the employer chooses to provide references, at a minimum, the references should confirm employment and length of service. Further comments should only be provided where the employer conducts a thorough investigation to ensure the accuracy of the contents. Employers should never provide a reference that they are unable to support.

# VI. LAYOFFS/WORK FORCE REDUCTIONS/REDUNDANCIES/COLLECTIVE DISMISSALS

## A. Overview

An employee who is terminated without just cause must be given statutory notice of termination. During the period of notice (see the list below), the employee may be asked to continue to work, or his or her employment may be terminated as of the date of notice. If an employee is terminated, he or she must be paid his or her regular wages for that period, in lieu of working the notice period. The *Employment Standards Act* legislates how much notice, or pay in lieu thereof, must be given to employees who are being terminated.

## B. Procedure

- *Mandatory Notice Periods*

Non-union employees must be given notice of termination, or pay in lieu thereof, as follows:

| Length of Service | Amount of Notice |
|---|---|
| • Six months to five years | Two weeks |
| • Five to 10 years | Four weeks |
| • 10 to 15 years | Six weeks |
| • 15 years or more | Eight weeks |

The *Employment Standards Act* does not have provisions governing mass terminations.

- *Transfer of Undertakings/TUPE*

Employees who work for an organization being sold or transferred are protected by a combination of statutory and common law principles. Section 28.1 of the Employment Standards Act states that where an employer sells a business or undertaking, or a part of a business or undertaking, and the purchaser employs and employee of the seller, the employment of the employee shall be deemed not to have been terminated or severed for the purposes of the Employment Standards Act, and his or her employment with the seller shall be deemed to have been employment with the purchaser for the purpose of any subsequent calculation of the employee's length or period of employment.
The courts recognize the realities of modern business life require a recognition of complex relationships between companies. There is case law concerning what happens to the employment relationship when and organization is sold or transferred. Several legal doctrines and principles have evolved to ensure "that permissible complexity in corporate arrangements does not work an injustice in the realm of employment law…"

The principal that personal services cannot be assigned to a new employer without the consent of the parties (the employee and the new employer), has been applied by the courts in order to prevent solvent parent or related companies from avoiding liability by attempting to transfer it to hollow subsidiaries. Accordingly, the transfer of a business, where it results in the change of the legal identity of the employer, constitutes an effective termination of employment in the form of a constructive dismissal (see section V.E. – Constructive Discharge), and the employee must be given notice and any other rights they are owed under the contract for early dismissal.

Employers may negotiate that the provision of particular benefits for their employees (substantially similar to those to which they were previously entitled) be included in the contract of sale. This may limit the amount of damages an employee can claim for the constructive dismissal as it limits the actual loss suffered.

If the employee chooses to continue in service of the business, the common law will recognize their past service with the seller or transferor and be given credit for the purposes of incidents of employment such as salaries, bonuses and notice of termination. This is considered an implied term in the contract of employment with the new employer and it may be negated by an express term to the contrary.

However, the Employment Standards Act ensures that where and employer sells a business or undertaking, or part of a business or undertaking, and the purchaser employs an employee of the seller, the employment of the employee is deemed not to have been terminated or severed and his or her employment with the seller is deemed to have been employment with the purchaser for the purpose of any subsequent calculation of the employee's length or period of employment. Employers cannot contract out of this section.

Other principles that protect employees after transfers tend to expand the list of defendants liable for damages related to employment claims. Among them are the "common employer" doctrine (when more than one organization is found jointly responsible for the same employee) and "piercing the corporate veil" (when the court looks beyond what is written in a contract to the actual reality of the employment relationship). Establishing the identity of the employer is key to determining liability to employees that arises both before and after the transfer. To decide this, the courts are entitled to ask, "In substance, who is his employer?"

- *Severance Pay*

There are no separate statutory requirements in PEI for severance pay other than the termination notice, or pay in lieu of notice, provisions in the *Employment Standards Act* as noted above.

- *Benefits*

Employees who work through their notice period are entitled to their full benefit coverage, and employers must make the contributions "as usual" for the duration of the notice period. Employers are not required by statute to maintain benefits for employees who are laid off.

- *Severance Packages/Separation Agreements*

For a detailed analysis of severance packages and separation agreements, please see sections V.C—Mandatory Severance Pay, and V.D.—Use of Severance Agreements and Releases, above.

## VII. UNFAIR COMPETITION/COVENANTS NOT TO COMPETE

### A. Trade Secrets

There are no statutes governing trade secrets as they relate to employment in PEI.

Under the common law, employees must not divulge confidential information or trade secrets that they acquire during their employment. Confidential information has value to the employer by it being generally unknown outside of the employer's business. It is information that if disclosed, would result in negative impact or damages to the employer's business. Confidential information may include: marketing strategies; business plans; personnel information; customer history and preferences; trade secrets such as manufacturing processes or formulas; sales data; commercial contracts; computer records; and supplier or customer lists.

Confidential information is distinguished from general business skills and knowledge of the industry that a former employee acquired through employment. Employees are not prevented from taking with them the general knowledge and skills they acquire when the employment relationship ends. Trivial or self-evident matters, and information otherwise available in the public domain, are generally not considered confidential information.

## B. Covenants Not to Compete

There are no statutes governing non-compete agreements as they relate to employment in PEI.

Employers may include non-competition covenants in their employment agreements. As a starting point, these restrictive covenants are presumed to be unenforceable as they impose a restraint on trade. They will only be enforced if a court determines that it is "reasonable" and no more restrictive than necessary to protect the employer's legitimate interests. This analysis considers the scope of the specific activities sought to be restricted, the duration for which the activities will be restricted, and the geographic area covered by the restriction. If the non-compete is overly broad, it will be unenforceable.

There are three types of contractual provisions designed to restrict employee rights during and after their employment. Known as restrictive covenants, these provisions include: (1) confidentiality or non-disclosure clauses designed to protect against the disclosure of confidential information; (2) non-solicitation clauses, which limit a former employee's ability to solicit the customers, employees, and/or suppliers of the employer for a specified period of time; and (3) non-competition clauses, which attempt to prevent certain competitive activities within a defined geographic area and for a specific length of time following termination. Non-competition clauses are the most restrictive, and generally are the most difficult to enforce.

Restrictive covenants are covenants in restraint of trade and, on their face, are void as being against public policy. A court will only enforce a restrictive covenant if it meets the following criteria:

- It is reasonable considering the relationship between the parties. There must be a valid reason why the restrictive covenant is required;
- The covenant must be for a reasonable period of time;
- The geographic scope must be reasonable; and
- The scope of prohibited activities must be reasonable in relation to the employee's duties.

## C. Solicitation of Customers & Employees

There are no statutes governing non-solicitation agreements for employees and customers as they relate to employment in PEI.

Non-solicitation agreements or clauses are more likely to be enforced by a court than non-compete clauses as they are less restrictive and are more closely aligned with the employer's legitimate proprietary interests. This is subject to the reasonableness requirements.

### D. Wage-Fixing and No-Poaching Agreements

In June of 2022, the federal government passed Bill C-19, amending the Canada *Competition Act*. The amendment makes it a criminal offense for unaffiliated employers to agree to fix employees' wages, or to establish that they (the employers) will not solicit or hire one another's employees. The law came into force on June 23rd, 2023, and will carry a hefty penalty of up to 14 years in prison and/or a fine deemed appropriate by the court. The Competition Act applies to all employers, whether they are subject to federal or provincial jurisdiction.

The Competition Bureau has found that the *Competition Act* does not apply to agreements formed by way of collective bargaining. As such, employers should not be concerned about any provision that was lawfully negotiated with a trade union.

### E. Breach of Duty of Loyalty/Breach of Fiduciary Responsibility

The common law prescribes certain obligations on employees and former employees regarding how they may interact with their former employer and its customers, suppliers and other related parties. All employees have an implied "duty of fidelity" to their employer which includes an obligation not to compete (either directly or indirectly) with their employer while still employed. The obligations imposed at common law after an employee leaves employment vary depending on the nature of the employment relationship. If the former employee is considered to owe a fiduciary duty to his or her former employer, then the former employee may have greater post-termination restrictions than other employees.

Directors, senior employees, and other "key employees" who have the authority to make decisions affecting the fundamentals of their employer's organization are generally considered fiduciaries. A fiduciary employee has more onerous obligations of loyalty, good faith, honesty, and avoidance of conflict and self-interest than an ordinary employee, and, therefore, does not have the same right as an ordinary employee to compete with his or her former employer after the employment relationship ends.

## VIII. PERSONNEL ADMINISTRATION

### A. Payroll Requirements

For information on method of payment, payment frequency, and record-keeping requirements, please see Section II.B. above.

### B. Required Postings

Section 39.1 of the *Employment Standards Act* requires an employer to post in a conspicuous place a copy of all orders under the *Employment Standards Act* relating to wages, hours of work, or any other condition or term of employment governed by the *Employment Standards Act* and its regulations.

Under the *Occupational Health and Safety Act*, the employer must post the names of the current occupational health and safety committee members or the representative and the means of contacting them, as well as the minutes of the most recent committee meeting

and ensure that they remain posted until superseded by the minutes of the next committee meeting. The employer must also post a code of practice required under the *Occupational Health and Safety Act*, a current telephone number for reporting occupational health or safety concerns, and the occupational health and safety policy where the employer is required by the *Occupational Health and Safety Act* to have such a policy.

Collective agreements may also contain certain provisions regarding when an employer must post information.

## C. Required Training

Employment-related training is mandated for certain safety-sensitive industries under the *Occupational Health and Safety Act*.

## D. Meal and Rest Periods

The *Employment Standards Act* provides that an employee must be given a rest period of at least 24 consecutive hours in every seven-day period. Whenever possible, this rest period should be on Sunday. Employees must also be given a rest or eating period of at least 30 minutes in duration at intervals such that no employee works longer than five consecutive hours without a rest period. An employer cannot require an employee to remain at the worksite during an unpaid rest or eating break.

A collective agreement between the employer and the employee may provide for a rest period that differs from this requirement with respect to its duration and timing.

## E. Payment Upon Discharge or Resignation

The *Employment Standards Act* requires employers to pay outstanding wages to terminated employees at the expiry of the notice period established by the *Employment Standards Act*. At that time, the employee must be provided with all pay to which he or she is entitled.

## F. Personnel Records

- Right of Access

An inspector employed by the Employment Standards Board may enter into any office or premises where the inspector has reason to believe employment records are kept or stored. The inspector may inspect and examine any books, payrolls, or other records of an employer that relate to pay, hours or work, or conditions of employment affecting any employee.

It is common for collective agreements to provide employees a right of access to the contents of their personnel file.

- Retention Requirements

The *Employment Standards Act* requires every employer to make and keep personnel records for 36 months after the date of last entry on the record for each employee. The records must contain certain information as required by the *Employment Standards Act*, including: the name, address, social insurance number, and date of birth of the employee;

the rate of wages of the employee and net pay for each pay period; the number of hours the employee works in each day and week; the gross earnings of the employee per pay period; the deductions from the employee's gross earnings and the nature of each deduction; the date the employee started employment and the date the employee's employment ended; the type of work performed by the employee; any period during which the employee was on vacation; any vacation pay due to be paid to the employee; any paid holiday pay due or paid to the employee; any period during which the employee was on a leave of absence and the reason for the leave of absence; the number of overtime hours the employee has accumulated and used; and the dates of dismissals, suspensions or layoffs of the employee and the dates of all the notices thereof.

Employers are privy to a significant amount of personal information regarding employees. The use of that information by private sector employers is not governed by legislation in PEI. The common law right to privacy is still developing, and there has been considerably more consideration of the issue of employee privacy in arbitral jurisprudence involving unionized workplaces.

Employers should exercise caution in the use of employee personnel information as the common law continues to evolve in this area. While Canadian courts have commented that there is no free-standing right to dignity or privacy under the *Charter*, in some cases the courts have found that the unauthorized use of employee personal information, for example, to conduct a credit check on an employee without the employee's permission, warranted a remedy consistent with *Charter* values.

The personal information of employees working in federally regulated organizations within the private sector is protected under the *Personal Information Protection and Electronic Documents Act*, SC 2000, c 5 ("*PIPEDA*"). *PIPEDA* falls under the authority of the Office of the Privacy Commissioner of Canada. Organizations covered by *PIPEDA* must obtain an individual's consent when they collect, use, or disclose that individual's personal information. It also gives people the right to access their personal information held by an organization and to challenge its accuracy. Personal information can only be used for the purposes for which it was collected. If an employer is going to use it for another purpose, they must obtain consent again. Individuals should also be assured that their information will be protected by appropriate safeguards. Notably, business contact information such as an employee's name, title, business address, telephone number, or email addresses that is collected, used, or disclosed solely for communicating with that person in relation to his or her employment or profession is not covered by *PIPEDA*.

## IX. PRIVACY

### A. Drug and Alcohol Testing

There is no statute in PEI that specifically regulates drug and alcohol testing. The *Human Rights Act* protects individuals against discrimination based on disability. Drug and alcohol dependencies are disabilities protected under the legislation. As such, testing programs that negatively affect persons who suffer from substance dependency may be considered discriminatory. However, a testing program can be upheld if it is a *bona fide* occupational requirement (BFOR). The case law has established that an employee may be asked to

submit to an alcohol or drug test if the employer has reasonable grounds to believe, based on observation of the employee's conduct or other indicators, that the employee is or may be unable to work in a safe manner because of the use of alcohol or drugs.

As drug and alcohol issues remain an ongoing concern in workplaces, employers have attempted to implement testing policies that aim to curtail drug and alcohol use. Those testing policies have generally taken five (5) distinct forms: pre-access testing, pre-employment testing, for cause testing, return to work testing, and random testing.

The current state of the law on this issue across Canada remains in flux. In 2013, the Supreme Court of Canada released a landmark decision in drug and alcohol testing. In *Communications, Energy and Paperworkers Union of Canada, Local 30 v Irving Pulp & Paper, Ltd.*, 2013 SCC 34 ("*Irving Pulp & Paper*") the majority of the Court found that in order for a drug and alcohol testing policy to be upheld, an employer must establish that such policy properly balanced employer safety concerns with the privacy interests of the employees. While that balancing will typically favour pre-access testing, pre-employment testing, and for cause testing in safety sensitive positions, other testing policies have been subject to high levels of scrutiny and are more likely to be found unreasonable.

Regarding random testing, the Court in *Irving Pulp & Paper* found that it is only acceptable in narrow circumstances, where an employer could provide evidence of enhanced safety risks in the workplace due to alcohol and drug use. Canadian courts are currently grappling with the issue of random testing in safety sensitive workplaces, but a definitive decision has yet to be reached. As such, employers looking to implement alcohol and drug testing policies must approach that decision with caution.

The law regarding pre-access testing is evolving and appears to vary upon jurisdiction.

## B. Off-Duty Conduct

There is no statute in PEI that specifically relates to off-duty conduct. Generally, an employer has no right to direct an employee's off-duty behaviour or activities.

The issue of off-duty conduct typically arises in the context of whether an employee can be disciplined for conduct that occurred outside of his or her normal work duties and hours. Employers are rightly concerned about their reputations and profits. When an employee, outside the normal course of his or her employment, does something that puts these interests in jeopardy, the employer has a right to take steps to protect its interests.

Determining whether off-duty conduct is grounds for discipline is done on a case-by-case basis and depends on several factors. Discipline, up to and including termination, may be justified where an employee's off-duty conduct prejudices the employer's interests. Certain egregious conduct, such as serious criminal conduct while off-duty, may be grounds for termination.

Off-duty conduct will generally warrant discipline when it is prejudicial to the employer's business or reputation, negatively impacts the duties of the employee in question, or where there is a causal connection between the impugned conduct and the employer's business, and the conduct is "wholly incompatible" with the employment relationship.

## C. Medical Information

Employers must be aware of privacy considerations in the collection, use, and disclosure of medical information. Employers must limit their request, use, and disclosure to only that which is necessary. This is especially the case for personnel records that contain medical information. Typically, medical information comes into the employer's possession in situations where an employee requires an accommodation in the workplace. In those cases an employer is only entitled to sufficient medical information to allow it to confirm an employee's absence, accommodation needs, or ability to perform his or her job duties and responsibilities. Rarely is it appropriate for an employer to need a diagnosis of an employee's medical condition. Employers should take steps to ensure that employee medical information is only shared on a need-to-know basis with identifiable employer representatives or as required by law.

## D. Searches

There is no statute in PEI that specifically regulates searching employees or the possessions of employees. However, employees are entitled to a reasonable expectation of privacy in the workplace. In unionized workplaces, the collective agreement may restrict or prohibit employee searches. There must be a balance between the employee's privacy interests against the employer's concerns with security and safety in the workplace. The degree of privacy to which a person is entitled in any given situation will vary depending on all the circumstances and the nature of the employer's worksite and industry.

## E. Lie Detector Tests

There is not statute in PEI that contains specific provisions related to the administration of lie detector tests in the workplace or the ability to request employees to take a lie detector test.

## F. Fingerprints

There is no statute in PEI that contains specific provisions related to the issue of fingerprinting. However, any requests for fingerprints should be reasonable, and consider the balance between an employee's privacy interests and the employer's legitimate needs to justify such an intrusion of privacy.

## G. Social Security Numbers

Employers are required to ask for and record an employee's Social Insurance Number ("SIN") upon hiring the employee in accordance with federal legislation related to verifying an employee's legal status to work in Canada and the withholding and remittance of statutory deductions and income tax. Employers are prohibited from distributing SINs to non-government third parties without consent from their employees.

## H. Surveillance and Monitoring

There are no statutes in PEI that prohibit the use of video surveillance and monitoring in the workplace.

Much like other kinds of workplace policies, the enforceability of workplace surveillance is

assessed based on a balancing of employer and employee interests. That requires considering the employer's rationale for surveillance and the interest it seeks to protect, as well as the modalities of surveillance to be used. It also requires consideration of whether less invasive steps other than surveillance could be implemented to achieve the same goal.

In unionized workplaces, arbitral jurisprudence has established that video surveillance is generally only permitted when there is a pressing need, such as evidence of a real and substantial problem of workplace theft, and where the parameters of the surveillance are not overly intrusive. For example, surveillance monitoring should not occur in locker rooms or other areas where employees have a heightened expectation of privacy. Before employers implement surveillance monitoring in the workplace, they should be confident that they can justify such action as necessary to resolve a real and substantial problem, and that the scope of the surveillance is no broader than necessary.

## I. Cannabis (medical and recreational use)

On October 17, 2018, the *Cannabis Act*, SC 2018, c 16 made Canada the second country in the world to legalize recreational cannabis and create a national cannabis market. Generally speaking, the *Cannabis Control Act* RSPEI 1988, c C-1.2 prohibits the recreational use of cannabis in the workplace, except in certain designated smoking areas.

The Duty to Accommodate under the *Human Rights Act* may be triggered through "disability." This could be the case if an employee has a disabling dependency, or if they are using cannabis as a treatment for a medical condition. Employees should be informed that they are not to self-medicate with cannabis during work hours and they may be obligated to notify their employer about their use of prescription cannabis if it is impairing.

Employers should address cannabis use as they would other unacceptable substances in the workplace (i.e. alcohol). They should maintain up to date internal workplace drug and alcohol and occupational health and safety policies that clearly reflect what is and is not acceptable in the workplace.

Canadian employers operating in both Canada and the U.S. should take particular care to ensure that employees crossing the border as part of their job responsibilities are aware of the US federal prohibition of cannabis and the heightened awareness of legal cannabis at the border and strict enforcement of federal law by US Customs and Border Protection.

For more information, please reach out to us at +1 902 377 2233.

## J. Social Media

PEI does not have any laws or statutes that address this issue. Employees can be disciplined for the inappropriate use of social media. Please see Section IX.B—Off Duty Conduct, for more information on how and employee's off-duty conduct, including social media, can affect the employment relationship.

Employers should develop a social media policy that addresses acceptable use of social media on and off duty, expectation of privacy issues, and consequences for failing to follow the policy.

### K. Weapons/Workplace Violence Policy

PEI does not have specific legislation addressing weapons in the workplace. Weapons possession and use is strictly regulated in Canada and failing to comply can amount to an criminal offence. Employers who intend to utilize weapons in the course of business should consult the *Criminal Code*, RSC 1985, c C-46 and the *Firearms Act*, SC 1995, c 39. Such a business will need to be licensed to possess firearms and must ensure that every employee of the business who, in the course of duties of employment would handle firearms, holds the applicable firearms license. In almost all circumstances, it is illegal for individuals to carry concealed weapons in Canada.

General Regulation EC180/87 under the *Occupational Health and Safety Act* requires employers to conduct a workplace violence assessment to determine whether or not a risk of injury to workers as a result of violence arising out of their employment is present. The risk assessment must include a consideration of previous experience of violence in the workplace; occupational experience of violence in similar workplaces; and the location and circumstances in which the work will take place.

If an employer identifies a risk of violence in the workplace, the employer must establish procedures, policies, and work environment arrangements to either eliminate the risk of violence or minimize the risk of violence. The employer must also provide for the reporting, investigating, and documenting of incidents of violence in the workplace.

An employer who identifies a risk of violence in the workplace must inform all employees who may be exposed to the risk of the nature and extent of the risk. Unless otherwise prohibited by law, this includes informing workers of information related to persons who have a history of violent behaviour who the worker may encounter in the course of his or her work.

An employer must ensure that a worker who reports an injury or adverse symptoms resulting from violence is advised to consult a physician of treatment or a referral.

## X. EMPLOYEE INJURIES AND WORKERS COMPENSATION

### A. Work Related Injuries

Employees who are injured on the job receive compensation under the PEI *Workers' Compensation Act*. Employees covered under the *Workers' Compensation Act* include all workers of all employers engaged in, about or in connection with, any industry in the province except those employees excluded under the *Workers' Compensation Act General Regulations*, PEI Reg EC831/94. For more information on workers' compensation in PEI, see Section III.A – Workers' Compensation above.

### B. Non-work related injuries

It is important to keep in mind that coverage for injuries may extend beyond the four walls of an employer's facility and may (depending on the circumstances) include injuries sustained while travelling from or to the workplace. Conversely, certain injuries sustained in an employer's physical workplace may not be insured. Further, non-work related injuries may be considered disabilities under the *Human Rights Act.* If that is the case, employers have a duty to accommodate those injuries up to the point of undue hardship.

## XI. UNEMPLOYMENT COMPENSATION

### A. Eligibility

Employment insurance benefits for employees in PEI are governed by federal legislation, the *Employment Insurance Act*, RSC 1996, c 23. The *Employment Insurance Act* is administered by Employment and Social Development Canada. Briefly, an employee may qualify to receive employment insurance benefits at times when the employee is unemployed or not working due to a variety of circumstances. If the employee meets certain eligibility criteria, including having paid into the Employment Insurance scheme and accumulating a requisite number of employment hours during the qualifying period, the individual may receive payment of benefits as a form of wage replacement while the individual is unemployed or not working.

The Employment Insurance (EI) program provides financial support to eligible workers by replacing part of their income while they:

- look for new employment to upgrade their skills or
- are absent from work due to:
- sickness
- childbirth or adoption
- caring for a child or adult who is critically ill or injured, or needs end-of-life care

EI regular benefits are available to individuals who:

- lose their jobs due to shortage of work or seasonal or mass lay-offs
- are looking for, available for and able to work, but can't find a job

EI special benefits provide support to employees or self-employed individuals who:

- are unable to work due to sickness
- are pregnant or recently gave birth
- are caring for a newborn or a newly adopted child
- are caring for a child or adult who is critically ill, injured or needs end-of-life care

EI fishing benefits provide support to qualifying self-employed fishers who are actively seeking work. EI work-sharing benefits help employers and employees avoid layoffs when

there is a temporary reduction in the level of business activity. While the employer recovers, the measure provides support to employees who work a temporarily reduced work week.

If the employee meets certain eligibility criteria, including having paid into the Employment Insurance scheme and accumulating a requisite number of employment hours during the qualifying period, the individual may receive payment of benefits as a form of wage replacement while the individual is unemployed or not working.

### B. Procedure

Employers are responsible for:

- advising employees to register for EI benefits as soon as possible after they stop working;
- accurately recording the reason for separation, hours worked, gross earnings and any money paid or payable on separation;
- ensuring the information on the Record of Employment (ROE) is accurate (knowingly making false or misleading statements may cause you to be subject to penalties);
- issuing ROEs when employees stop working;
- promptly responding to all Service Canada requests for information;
- storing blank paper ROEs in a safe place for your business use only;
- contacting Service Canada if:
    - you offer work to an EI claimant who does not accept it;
    - you must pay an employee an arbitration award or similar settlement.

For more information, Employers can contact the Employer Contact Centre at 1-800-367-5693.

## XII. HEALTH AND SAFETY

### A. Overview

The *Occupational Health and Safety Act* is designed to legislate the responsibilities of both employees and employers to ensure the health and safety of all members of the workplace. The purpose of the *Occupational Health and Safety Act* is to protect workers and self-employed persons from risks to their safety, health, and physical well-being arising out of or in connection with activities in their workplaces.

Employee involvement generally is through participation in a Joint Occupational Health and Safety Committee (JOHSC). In PEI, a JOHSC is required in all workplaces with more than 20 employees. Workplaces of this size also require the adoption of a written occupational health and safety program that meets certain statutory requirements. Employers with between five and 20 employees must establish a written occupational health and safety policy and may be ordered by the Director of Occupational Health and Safety to establish a JOHSC.

Under the legislation, an employee can refuse to perform work where he or she has reasonable grounds to believe that the work is dangerous to his or her occupational health and safety, or the occupational health and safety of others. Where an employee refuses to perform work, the *Act* sets out a complaint and investigation procedure to ensure that the complaint is valid and, if so, to determine when it is safe for the employee to perform the intended work.

An employer must ensure that its workers are aware of their responsibilities and duties under the *Occupational Health and Safety Act*. This includes providing adequate communication, and instructions of safety precautions to employees to ensure that the instructions are carried out. Employers must provide and maintain in good condition personal protective equipment and clothing as required by the *Occupational Health and Safety Act* and ensure that their workers use such equipment. Employers must also provide any training that is necessary to ensure the occupational health and safety of its workers.

Under the *Occupational Health and Safety Act*, Occupational Health and Safety Officers ("Officers") may at any reasonable hour enter and inspect a work site. In carrying out an investigation, the Officers can request and examine any records or documents that relate to the health or safety of workers. They may also do any of the following: inspect or seize material, product or equipment; make tests and take photographs or recordings in respect of any work site; and make any examination, investigation, or inquiry as the Officer considers necessary.

If an Officer makes an adverse finding regarding the safety or the health of workers in a workplace, then he or she may issue an order to address that finding. The power to issue orders is outlined in the *Occupational Health and Safety Act* and includes the power to order a work stoppage.

Where an accident occurs in the workplace in which a worker is seriously injured in a manner which causes or may cause a fatality, suffers a loss of limb, unconsciousness, substantial loss of blood, a fracture, an amputation of a leg, arm, hand, or foot, a burn to a major portion of the body, or the loss of sight in an eye, the employer must ensure that written notice is sent, by the fastest means available, to the Director of Occupational Health and Safety within 24 hours of the accident.

Any person who contravenes or fails to comply with a provision of the *Occupational Health and Safety Act*, the regulations, or an order issued under the *Occupational Health and Safety Act* is guilty of an offence and, upon conviction, is liable to a fine of not more than $250,000 or imprisonment for a term of not more than one month, or both in addition to $5000 for each day the offence continues. Offences under the *Occupational Health and Safety Act* are strict liability offences. If the Crown proves beyond a reasonable doubt that the employer is guilty of an offence, the burden of proof shifts to the employer to show that on a balance of probabilities, it exercised due diligence. The employer must show that it exercised all reasonable care or had a mistaken belief in a set of facts, which if true, would have rendered its actions innocent.

An employer has the right to appeal, orally or in writing, any order issued by an Officer under the *Occupational Health and Safety Act* to the Director. The Director may affirm the order,

rescind the order, or make a new order based on his or her findings. A decision made by the Director may be appealed and an arbitrator appointed to hear the appeal. The arbitrator may affirm the order, rescind the order, or make a new order based on his or her findings. The arbitrator's is final and not subject to review by a court.

### B. Regulatory Requirements

- *Social Elections*

PEI does not have any laws or statutes that address this issue. For more information, please reach out to us.

- *Works Councils*

PEI does not have any laws or statutes that address this issue. For more information, please reach out to us.

- *Health and Safety Committee*

For information on an employer's obligation to establish a Joint Occupational Health and Safety Committee, see Section XII.A above.

## XIII. TRADE UNIONS – INDUSTRIAL RELATIONS

### A. Overview

Labour relations in PEI are governed primarily by the *Labour Act* and its regulations. This statute is administered by the Labour Relations Board (the "Board"), which is the independent and impartial tribunal responsible for the day-to-day administration of PEI's labour laws.

The *Labour Act* provides the mechanism for union and employer (or management) relations in provincially-regulated workplaces. It governs the relationship between unionized employees, unions, and employers, sets a framework for proper conduct in the union-management relationship, and sets out timelines relating to bargaining rights in order to enhance stability. The *Labour Act* does not apply to employees who are working in federally-regulated unionized workplaces where federal legislation, namely the *Canada Labour Code*, would apply.

#### Favored/Disfavored by Government

PEI does not have any laws or statutes that address this issue. For more information, please reach out to us.

#### Prevalence of Trade Unions

PEI does not have any data which speaks to this issue. For more information, please reach out to us.

## Special Requirements (e.g. US-Right to Work)

PEI does not have any laws or statutes that address this issue. For more information, please reach out to us.

## Works Council

PEI does not have any laws or statutes that address this issue. For more information, please reach out to us.

## Challenges for a Unionized Business

PEI does not have any laws or statutes that address the challenges faced by unionized businesses. However, the *Labour Act* and its regulations govern the relationship between employers and trade unions, including certification, collective bargaining, and the resolution of labour disputes.

Implications of managing a unionized business include:

- A decreased ability to communicate directly with employees about all work-related matters or negotiate individually;
- higher labour costs;
- decreased flexibility as employers must adhere to concessions made in collective bargaining, often affecting the right to contract out work, require overtime, determine the size and mix of the workforce, leave temporary vacancies unfilled, discipline employees without significant challenges and terminate employees without cause;
- a risk of developing a "we/they" type atmosphere;
- additional expenses related to addressing grievances and arbitration costs;
- increased time commitment, particularly around collective bargaining;
- the risk of work stoppage.

## B. Right to Organize/Process of Unionization

In Prince Edward Island, every employee has a Constitutional right to become a member of a trade union. A union may apply to become the certified bargaining agent for a unit of employees claiming to have, as members in good standing, a majority of employees of one or more employers in a bargaining unit.

A union may apply to become the certified bargaining agent for a unit of employees who claim that a majority of the employees in a unit that is appropriate for bargaining wish for that union to be certified as the bargaining agent on their behalf.

Where a trade union applies for certification, the Labour Relations Board will determine whether the unit for which the application is being made is appropriate for collective bargaining. The Board has discretion to include additional employees or exclude any current employees in order to make the unit appropriate.

A certification order may be revoked (also known as "decertification") if the majority of employees in the unit no longer wish to be represented by the bargaining agent previously certified.

Voluntary recognition is an alternative means for a union to acquire bargaining rights. An employer and trade union can agree that the employer recognizes the union as the exclusive bargaining agent for its members. Voluntary recognition avoids the certification process under the *Labour Act*. Section 19 of the *Labour Act* provides that, where a union purports to represent and bargain on behalf of the employees of an employer, the union and employer may enter a voluntary recognition agreement, whereby the employer recognizes the trade union as the exclusive bargaining agent for the employees, and the unit of employees to which the agreement applies is defined. A voluntary recognition agreement must be in writing.

The *Labour Act* imposes strict timelines in bargaining and should be referred to carefully to ensure compliance.

## C. Managing a Unionized Workforce

- ***Collective Bargaining***

S. 37(1) of the *Labour Act* states that every collective agreement must contain a provision for the final and binding settlement by arbitration, without stoppage of work, of all differences between the parties arising from the interpretation, application, administration, operation or alleged violated of the agreement, including any question as to whether a matter is arbitrable. Typically, collective agreements contain provisions concerning union recognition and the scope of the collective agreement. Additionally, a collective agreement often includes language regarding the deduction and remittance of union dues, and the applicable arbitration and grievance procedures. Other provisions typically found in collective agreements include those relating to progressive discipline and termination; union membership eligibility; seniority; layoff and recall; contracting out; hours of work and scheduling; pay and benefits; management rights; discrimination; and other rules specific to the workplace.

Once concluded, the *Labour Act* provides that the collective agreement is binding on the parties to it or affected by it. This includes the bargaining agent and the employees in the unit of employees that the bargaining agent represents, and an employers' organization and employer who has entered into the agreement or on whose behalf the agreement has been entered.

A collective agreement, certification, application, notice, or entitlement to give notice continues in force, and is binding on the purchaser, lessee, trustee, or the person otherwise acquiring an employer's business. This is true whether the employer sells, leases, or transfers, or otherwise disposes of, or agrees to sell, lease, transfer, or otherwise dispose of his or her business or the operations of the business, or a part of either, unless the Board directs otherwise.

- *Dispute Resolution*

Strike action or lockouts are prohibited during the period in which a collective agreement is in place. Strikes and lockouts are permissible during collective bargaining. All employees defined in a bargaining unit represented by a trade union may legally strike or be locked out by an employer, except those employed as firefighters, police officers, or hospital employees who do not have the right to strike pursuant to section 41(5) of the *Labour Act*.
A strike or lockout vote taken by secret ballot must precede any strike or lockout action. All employees in the bargaining unit are entitled to vote, and a majority must vote in favour in order for the declaration of a strike or lockout to be made. A lockout vote is only necessary where an employers' organization is involved. A vote to ratify the employer's offer under the proposed collective agreement and a strike vote may be combined on a single ballot.
No strike or lockout vote may be held until 9 days have elapsed (7 day waiting period plus 2-day mailing period) after the Minister has decided not to appoint a conciliation officer or a conciliation board for the purposes of concluding a collective agreement. Written notice, at least 24 hours in advance, must be given by a trade union or an employer before a lawful strike or lockout can take place.

- *Impact on Management Rights*

All working conditions are frozen once the Board is served with an application for certification. During this period, an employer cannot alter wage rates, terms of employment, or any other employment privilege. The freeze remains in effect until the union's application is either dismissed or a certification order is issued, and the union gives notice to bargain. If a certification order is issued and the union gives notice to bargain, a second, virtually identical, statutory freeze commences.

Where a trade union applies for certification, the Board will determine whether the unit for which the application is being made is appropriate for collective bargaining. The Board has discretion to include additional employees or exclude any current employees in order to make the unit appropriate for collective bargaining. It has the authority to make inquiries or take any steps necessary to determine the wishes of the employees in the proposed bargaining unit, including calling a representation vote.

Where an employee has applied in writing for membership in a trade union, the expression "member" or "member in good standing" includes a person who has paid at least $2.00 to the trade union on his or her own behalf with respect to initiation fees, or monthly or other periodic dues. If a trade union is unsuccessful in certifying a bargaining unit, the Board may prescribe a waiting period before a new application can be considered.

Employers cannot attempt to prevent an employee from becoming a union member or from exercising other rights under the *Labour Act*; nor may an employer discriminate against an employee based on membership in a union. Such actions are considered unfair labour practices.

A certification order may be revoked (also known as "decertification") following an investigation by the Board where it is determined that a bargaining agent no longer

represents a majority of the employees in the unit for which it was certified or for which it is serving as the bargaining agent. Following the revocation, the employer is no longer required to bargain collectively with the bargaining agent.

Voluntary recognition is an alternative means for a union to acquire bargaining rights. An employer and trade union can agree that the employer recognizes the union as the exclusive bargaining agent for its members.

The *Labour Act* imposes strict timelines in bargaining and should be referred to carefully to ensure compliance.

## XIV. IMMIGRATION / LABOR MIGRATION

Temporary and permanent immigration to Canada is governed by federal legislation--the *Immigration and Refugees Protection Act*, S.C. 2001, c. 27 ("IRPA") and the *Immigration and Refugee Protection Regulations*, SOR/2002-227 ("IRPR"). In recent years, many Canadian provinces have enacted specific foreign worker protection legislation to supplement the general employment standards that apply to everyone. These measures recognize that foreign workers can be particularly vulnerable, especially when their status in Canada is tied to a single employer by virtue of the terms and conditions of their work permit.

PEI's *Employment Standards Act* does not include any additional specific protections for foreign workers. However, in May 2022, the Province passed the *Temporary Foreign Worker Protection Act*, S.P.E.I. 2022, c. 65 which at the time of writing had not yet been proclaimed into force. This Act will provide additional protection to foreign workers employed in PEI, beyond those found in *Employment Standards Act*. The *Temporary Foreign Worker Protection Act*, which is expected to come into force once corresponding regulations are finalized. Pursuant to this legislation, PEI will introduce licensing requirements for recruiters of foreign workers and a registry for employers of temporary foreign workers.

### A. Overview Business Immigration Policy

International business travel to Canada and the temporary employment of international talent (foreign workers) in Canada is governed by IRPA, IRPR and Canadian immigration policy. Foreign nationals must hold a work permit that properly authorizes the activities they will perform in Canada, or be eligible for one of the work permit exemptions that permit certain foreign nationals to work in Canada without a work permit in certain situations.

- *Work Permits and Exemptions*

The standard process to obtain a work permit involves two steps. First, an employer must obtain a Labour Market Impact Assessment ("LMIA") to confirm, among other things, that employing a foreign national in a particular role will likely have a positive or neutral impact on the Canadian labour market. In most cases, employers seeking LMIA confirmation must test the domestic labour market by conducting a robust recruitment campaign to

demonstrate there are no qualified and available Canadians or permanent residents for the role.

Once LMIA confirmation is in place, the foreign national is then able to apply for an employer-specific work permit to authorize their employment in Canada. Foreign nationals who do not require a temporary resident visa ("TRV") to enter Canada, can apply for an LMIA-based work permit at the port of entry, upon arrival in Canada. Foreign nationals who require a TRV to enter Canada must apply for their work permit online (and their application must be approved) before travelling to Canada. Work permit processing times vary throughout the year and from one Canadian visa office to another, but generally speaking applying for a work permit from overseas adds anywhere from two weeks to several months to the process.

Since it can also be cumbersome and time consuming to obtain an LMIA, employers who wish to hire a foreign national in Canada are advised to consider whether any of the facilitative work permit categories exempt from the LMIA requirement (or a work permit exemption) apply given the candidate and position in question before engaging the LMIA process. Various LMIA-exempt work permit categories are available pursuant to public policies, international agreements to which Canada is a signatory and IRPR. As an example, LMIA-exempt work permits are available for eligible intra-company transferees, certain professionals under the *Canada-United States-Mexico Agreement* (and other free trade agreements), and highly specialized international resources whose work in Canada will create or maintain significant benefits or opportunities for Canadians and permanent residents of Canada. These LMIA exemptions are only a few of the many facilitative work permit options available.

The eligibility requirements for various LMIA-exempt work permit categories are informed by Canadian immigration policy and are flushed out by Immigration, Refugees and Citizenship Canada ("IRCC") in their program delivery instructions published online for Temporary Workers.

## B. Protocol for business visitors to obtain temporary entry for non-employment purposes

Pursuant to subsection 186(a) and section 187 of IRPR, international business travelers coming to Canada to perform activities that do not constitute direct entry into the Canadian labour market are eligible to work in Canada without a work permit as business visitors. Those seeking admission to Canada as a business visitor must be prepared to demonstrate their eligibility for this work permit exemption with documentary evidence.

Depending on their nationality, a foreign national may require a TRV to authorize their admission to Canada. Except for American citizens, foreign nationals from visa-exempt countries must obtain an electronic Travel Authorization ("eTA") to enter Canada by air.

## C. Visa options for the temporary employment of professional/management foreign nationals

Unless eligible for a specific work permit exemption, a foreign national requires a work permit to authorize their employment in Canada in professional and managerial positions. An applicant's eligibility for an LMIA-exempt work permit is fact-specific and must be assessed on an individual basis.

There is a short-duration work permit exemption available for foreign nationals coming to Canada to perform managerial or professional activities for a maximum of 15 consecutive days (available once every 6 months), or for a maximum of 30 consecutive days (available once per year).

## D. Visa options for the temporary employment of non-professional employees

With some limited exceptions, most notably for after-sales service providers coming to Canada to provide proprietary or product-specific assistance and support for the installation, configuration, start-up and commissioning or repair of specialized commercial or industrial equipment or software purchased or leased outside of Canada, foreign nationals coming to Canada to perform work that is not professional or managerial will require a work permit to properly authorize their activities. Moreover, some highly specialized high- and semi-skilled foreign nationals qualify for LMIA-exempt work permits, but generally temporary foreign workers contracted to work in Canada in non-professional and non-managerial roles will require an LMIA-based work permit to authorize their employment.

## E. Visa options for foreign entrepreneurs and/or business investors

- *Start-up Visa Program*

Canada offers a start-up visa program for entrepreneurs who possess the necessary skills and potential to build innovative businesses in Canada that will create jobs for Canadians and permanent residents of Canada and compete on a global scale. To apply to the start-up visa program, an applicant's business idea or venture must first be supported by one or more designated organization.

The start-up visa program is a permanent immigration pathway which eventually leads to permanent residence status in Canada. However, while a start-up visa application for permanent residence is processed by IRCC, the applicant can apply for a work permit that will allow them to come to Canada and start their business in the meantime.

- *Self-employed/entrepreneur work permit*

This LMIA-exempt work permit category is designed for self-employed foreign nationals seeking to come to Canada temporarily, usually on a seasonal basis, to operate a business that will create significant social, cultural, or economic benefits or opportunities for Canadians and permanent residents. Because of high volumes of applications under this program, this work permit category was temporarily paused on April 30, 2024 and will re-open on January 2027. There is also a facilitative work permit category is also available to foreign nationals whose immigration to Canada has been nominated by a province under a provincial nominee program entrepreneurial stream.

## F. Permanent residency based on employment

There are many pathways through which a foreign national can apply for permanent resident status in Canada. The permanent residence programs available in Canada can be classified under the three main categories or classes: (1) Economic Classes, (2) Family Class and (3) Refugee Class. It is much easier to immigrate to Canada under an Economic Class program with the support of a Canadian employer with whom the applicant has accepted an offer of employment or is currently employed. Having one or more years of Canadian work experience also enhances a foreign national's eligibility for permanent residence and/or the likelihood they will be invited to apply for permanent residence status in Canada.

Eligibility for permanent residence in Canada must be assessed on a case-by-case basis. For more information or assistance developing a strategy for an employee to become a permanent resident of Canada, please reach out to the Immigration Law Team at Barteaux Labour and Employment Lawyers Inc. by contacting Andrea Baldwin at (902) 536-3109 or abaldwin@barteauxlawyers.com.

## G. Citizenship for foreign nationals

To become a naturalized citizen of Canada, it is necessary to first become a permanent resident. To be eligible for Canadian citizenship, a permanent resident must accumulate at least 1,095 days of physical presence in Canada within five-years. Another important requirement for Canadian citizenship is to file Canadian income tax returns (if required) for three out of five years, matching the physical presence requirement.

Subject to some exemptions, citizenship applicants must pass a test to demonstrate knowledge of Canada's history and heritage and the rights and responsibilities of being a Canadian citizen. Most citizenship applicants are also required to demonstrate adequate language skills in English or French.

## H. Compliance concerns for employers of foreign nationals

- *Consequences of Unauthorized Employment (and Work) in Canada*

It is an offence contrary to section 124 of IRPA to employ a foreign national in Canada without proper authorization. This offence is punishable by a fine of up to $50,000 and/or imprisonment for up to two years. Employers must exercise due diligence to determine whether a foreign national is properly authorized to work in Canada. An employer who fails to exercise due diligence to confirm that a foreign national is properly authorized to work for them in Canada is deemed to have known the employment was not authorized.

Foreign nationals who work in Canada without proper authorization open themselves to many risks including potential removal from Canada, a six-month ban against working in Canada and being found inadmissible to Canada for non-compliance. The risks faced by foreign nationals who work in Canada without proper authorization can also impact

employers whose operations depend on key international resources to fill labour shortages and skills gaps in Canada.

- *Conditions Imposed on Employers of Foreign Nationals*

Various conditions are imposed on employers of foreign nationals in Canada pursuant to sections 209.2 to 209.4 of IRPR including but not limited to providing a foreign worker with the same occupation and substantially the same (but not less favourable) wages and working conditions as those set out in their offer of employment; complying with the applicable federal and provincial laws that regulate employment and the recruitment of employees; and making reasonable efforts to provide an abuse-free workplace.

An employer's compliance with the regulatory conditions imposed on their employment of foreign nationals is monitored by the Government of Canada through employer compliance inspections. Non-compliance discovered during an inspection that cannot be justified constitutes a violation that is subject to one or more of the following sanctions:

- a warning;
- a period of ineligibility from hiring foreign workers;
- inclusion of the employer's information on a public website of ineligible employers; and
- an administrative monetary penalty.

## I. Regional, Federal, or state/province specific immigration or compliance issues

### Prince Edward Island Provincial Nominee Program

Through the Prince Edward Island Provincial Nominee Program ("PEI PNP"), prospective immigrants with the skills and experience targeted by Prince Edward Island can be nominated for immigration to Canada. Provincial nomination is a preferred pathway for obtaining permanent residence in Canada for many foreign nationals because of the flexibility built into many of the nomination streams.

Currently, the following nomination streams are available under the PEI PNP:

- The **Skilled Worker PEI Express Entry Stream** invites candidates to apply for a nomination who have a profile in the federal Express Entry pool.

- The **Skilled Workers in PEI Stream** is for candidates in Canada with a valid work permit and a job offer from a PEI employer in a skilled role.

- The **Skilled Workers Outside Canada Stream** is for candidates outside of Canada with a valid a job offer from a PEI employer in a skilled role.

- The **Occupations in Demand Stream** is for candidates with a job offer from a PEI employer is one of the identified in-demand occupations. This list is updated regularly based on labour market needs.

- The **Critical Workers Stream** is for candidates with a job offer from a PEI employer in a low-skilled occupation.

- The **Entrepreneur Work Permit Stream** is for experienced business owners who want to invest in and run a business in PEI. Applicants are required to participate in the day-to-day management of the business and must have a net worth of at least $600,000.

## XV. ADDITIONAL INFORMATION

### Contact Information

For more information about labour and employment law in Nova Scotia please contact **Nancy Barteaux, K.C.** or **Michelle Lahey**.

For more information about Canadian immigration law, please contact **Andrea Baldwin** or **Lana Roberts**.

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